No. 16-1466

In The Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Twice in the past five years this Court has questioned its holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that it is constitutional for a government to force its employees to pay agency fees to an exclusive representative for speaking and contracting with the government over policies that affect their profession. *See Harris v. Quinn*, ___ U.S. ___, ___, 134 S. Ct. 2618, 2632-34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309-10, 132 S. Ct. 2277, 2289 (2012). Last term, this Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. California Teachers Ass'n*, ___ U.S. ___, 136 S. Ct. 1083 (2016).

This case presents the same question presented in *Friedrichs*: should *Abood* be overruled and public-sector agency fee arrangements declared unconstitutional under the First Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Introduction 4

II. Overruling *Abood* is unlikely to cause a significant decline in union membership or spending 5

A. Allowing workers to choose whether or not to support the union has not significantly affected union membership 6

B. The number of opt-outs likely to result from overruling *Abood* is smaller than the number of covered nonunion members 9

C. Enactment of Indiana's right-to-work law did not reduce union spending 12

III. At worst, union leadership can respond to an overturning of *Abood* by refocusing its attention on actions that are likely to increase worker satisfaction with the union and their job 13

A. Union membership does not correlate with job satisfaction 14

TABLE OF CONTENTS – Continued

Page

B. Unions have demonstrated that they can thrive without compulsory dues by focusing attention to their members and their priorities 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ..... *passim*

Bennie v. Munn, 137 S. Ct. 812 (2017) 2

Ctr. for Competitive Politics v. Harris, 136 S. Ct. 480 (2015) 2

Friedrichs v. Cal. Teachers Ass'n, ___ U.S. ___, 136 S. Ct. 1083 (2016) 2

Harris v. Quinn, 134 S. Ct. 2618 (2014) ..... *passim*

Knox v. SEIU, Local 1000, 567 U.S. 298 (2012) 6, 9

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 U.S. LEXIS 4226 (June 26, 2017) 2

Minority TV Project, Inc. v. FCC, 134 S. Ct. 2874 (2014) 2

Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) 2

Wayside Church v. Van Buren Cty., No. 17-88, 2017 U.S. LEXIS 6615 (Oct. 30, 2017) 1

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Benjamin Collins, Cong. Research Serv., R42575, Right to Work Laws: Legislative Background and Empirical Research (2014) 6

Brianne Pfannenstiel, *In Biggest Vote Since New Law, Iowa Public Unions Overwhelmingly Choose to Recertify*, The Des Moines Register (Oct. 25, 2017) 18

Daniel G. Gallagher & George Strauss, *Union Membership Attitudes and Participation* (Inst. Res. Lab. Emp., Working Paper #29-91) (1991)..... 19

James Sherk, *One Person, One Vote, One Time? Re-election Votes Hold Unions Accountable to Their Members*, The Buckeye Institute (Sept. 5, 2016) 17, 18, 20

James Sherk, *Right-to-Work Laws Don't Lower Private-Sector Pay*, Heritage Foundation Issue Brief No. 4457 (Sept. 1, 2015) 11

James Sherk, *Unions Charge Higher Dues and Pay Their Officers Higher Salaries in Non-Right-To-Work States*, Heritage Foundation Backgrounder No. 2987 (Jan. 26, 2015) 12, 20

Jane H. Lillydahl & Larry D. Singell, *Job Satisfaction, Salaries and Unions: The Determination of University Faculty Compensation*, 12 Econ. Educ. Rev. 233 (1993) 15

Jason Russell, *How Right to Work Helps Unions and Economic Growth*, Economics21 (Aug. 27, 2014) 8

TABLE OF AUTHORITIES – Continued

Page

Lauren Camera, *Teachers' Unions to Spend Far More Than Ever in State, Local Elections*, Education Week (Oct. 22, 2014) 20

Lydia DePillis, *The Supreme Court's Threat to Gut Unions is Giving the Labor Movement New Life*, The Washington Post (July 1, 2015).....16

Lydia DePillis, *Why* Harris v. Quinn *Isn't as Bad for Workers as it Sounds* (July 1, 2014).....17

Michael E. Gordon & Angelo S. Denisi, *A Reexamination of the Relationship Between Job Satisfaction and Union Membership*, 48 Indus. & Lab. Rel. Rev. 222 (1995) 14

Network Indiana, *Right to Work Not Decreasing Union Membership*, Indiana Public Media (July 25, 2014).....7

News Release, Bureau of Labor Statistics, *Union Members 2014*, USDL-15-0072 (Jan. 23, 2015).....9

Noam Scheiber, *A Power Broker Who Wants Labor at the Table, Not on the Menu*, The New York Times (July 29, 2016) 16

Patrick J. Wright, *Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey's Public Sector Unionism Data Sufficiently Reliable?* U. Chi. Legal F. (forthcoming Nov. 2017).....7

R. Kearney & P. Mareschal, Labor Relations in the Public Sector (5th ed. 2014).....4

TABLE OF AUTHORITIES – Continued

Page

Ronald Meng, *The Relationship Between Unions and Job Satisfaction*, 22 Applied Econ. 1635 (1990) 14, 15

Right To Work Not Decreasing Union Membership, Indiana Public Media (July 25, 2014) 7

Russell S. Sobel, *Empirical Evidence on the Union Free-Rider Problem: Do Right-to-Work Laws Matter?* 16 J. Lab. Res. 347 (Summer 1995) 10, 11

The Des Moines Register, *Database: Iowa Public-Sector Union Recertifications* 18

Tom Lampman, *Surprising Results from Indiana's Right-to-Work Law*, The Buckeye Institute (Sept. 4, 2015) 7, 13

Tom McGinty & Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, Wall Street Journal (July 10, 2012) 19

United States Census Bureau, Current Population Survey 7

United States Department of Labor, Bureau of Labor Statistics, Union Membership Historical Table for Indiana 8

United States Department of Labor, Bureau of Labor Statistics, Union Membership Historical Table for Michigan 8

STATEMENT OF *AMICI CURIAE*[1]

The Buckeye Institute for Public Policy Solutions (the Buckeye Institute) was founded in 1989 as an independent research and educational institution – a think tank – to formulate and promote free-market solutions to Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). It has long advocated policies that guarantee to workers a genuine choice as to whether to join a union or spend their money to support a union. The Buckeye Institute files and joins *amicus* briefs that are consistent with its mission and goals. Examples of recent *amicus* efforts include the briefs it filed in *Wayside Church v. Van Buren County*,

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

No. 17-88, 2017 U.S. LEXIS 6615 (Oct. 30, 2017) in the Supreme Court of the United States; *Center for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); and *Friedrichs v. California Teachers Ass'n*, ___ U.S. ___, 136 S. Ct. 1083 (2016).

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court. In particular, SLF advocates for the protection of our First Amendment rights. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of their First Amendment freedoms. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, 217 U.S. LEXIS 4226 (Jun. 26, 2017); *Bennie v. Munn*, 137 S. Ct. 812 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Minority TV Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014).

SUMMARY OF ARGUMENT

Thirty years ago, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court established the framework for the permissible uses of compulsory

union fees paid by public employees. *Id.* at 232-36. It justified requiring all public employees, even nonunion members, to pay a union for bargaining with the government and administering the resulting contract, on the belief that unions perform a "service" that "benefits" all members of the bargaining unit. *Id.* As Petitioner points out, the Court recently re-examined *Abood*, providing at least six reasons to question its analysis and holding. *See Harris v. Quinn*, 134 S. Ct. 2618, 2632-34 (2014). The Court ultimately declined to overrule *Abood*, instead finding it inapplicable to the case because it did not involve "full-fledged public employees." *Id.* at 2638. While *Abood* remained intact, the dissenters took issue with the Court's refusal to reaffirm it. *Id.* at 2645 (Kagan, J., dissenting). They contended that unions should be allowed to impose compulsory fees on nonmembers simply because they have always done so. The dissenters also reasoned that if unions cannot impose such mandatory fees, they will not be able to operate. In other words, don't upset the apple cart because if you do, unions will not be able to survive.

Nothing could be further from the truth and the evidence shows as much. The enactment of right-to-work laws has not killed the unions. Rather, in Indiana, both union membership and union spending increased after the State enacted a right-to-work law. In Oklahoma, average union growth rates increased by 42% since a right-to-work law was enacted in 2001. And, in Michigan, union membership has seen recent increases after an initial small decline. In addition to

increases in membership and spending, union officials in these and other right-to-work states have responded by increasing their efforts to serve their members and recruit nonmembers. Thus, the evidence shows that the unions do not need *Abood* to survive.

ARGUMENT

I. Introduction.

In *Harris v. Quinn*, this Court noted that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop." 134 S. Ct. at 2634. It went on to show why that "empirical assumption" was "unsupported." *Id.* First, as the Court observed, "A union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked." *Id.* at 2640. The benefits of labor peace can be achieved without requiring nonmembers to contribute agency fees, as the experience of unions in some federal agencies shows.[2] Second, the benefits received by personal assistants in

[2] The dissenting Justices also recognized that there is no "inextricabl[e]" connection between exclusive representation and the need to collect agency fees from nonmembers. As Justice Kagan pointed out, while the American Federation of Government Employees represented some 650,000 federal employees in 2012, fewer "than half of them were dues-paying members." *Harris*, 134 S. Ct. at 2657 n.7 (Kagan, J., dissenting) (citing R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014)).

Illinois (the employees at issue) after the union began to represent them could not be shown to be unachievable without the agency fees on nonmembers. *Id.* at 2641.

Given the "unsupported" nature of the asserted importance of exclusive representation in the public sector, what effects are likely to flow from ending the mandatory payment of agency fees to those exclusive representatives? Nonunion members can be protected from the First Amendment harms created by the compulsory collection of agency fees without harming unions or their would-be voluntary members. In fact, overruling *Abood* will likely encourage more diligent and attentive unions and, thereby, increase membership satisfaction.

II. Overruling *Abood* is unlikely to cause a significant decline in union membership or spending.

Overruling *Abood* will enable some public union members to opt-out of paying some or all of their agency fees. Despite various assertions, this would not destroy the unions. The experience of states that have recently enacted right-to-work laws and scholarly studies addressing free ridership show us as much.

A. Allowing workers to choose whether or not to support the union has not significantly affected union membership.

Some believe that a state's enactment of a right-to-work law will start a rush for the doors on the part of union members. The recent enactment of right-to-work laws in Indiana, Michigan, and Oklahoma do not, however, support that view. As a general matter, disaffiliation and de-unionization are not new concepts. Rather, they are part of a long-term trend that is plainly independent of this Court's decisions in *Harris* and *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012).

While union membership has long been on the decline, a closer look shows that the decline is "independent of [right-to-work] policies." Benjamin Collins, Cong. Research Serv., R42575, Right to Work Laws: Legislative Background and Empirical Research 9 (2014). A recent empirical study shows that "union membership rates have declined in both [right-to-work] and union security states since 1983" and that "[t]he share of workers covered by a collective bargaining contract (i.e., union members plus covered workers who are not members) has followed a similar trend." *Id.* However, trends can and do change. We have seen evidence of this with respect to union growth in three states which recently enacted right-to-work laws: Indiana, Michigan, and Oklahoma. In all three of these states, the unionized population actually increased *after* the right-to-work laws became effective.

In 2012, Indiana enacted a right-to-work law and the results are "far from 'union busting.'" Tom Lampman, *Surprising Results from Indiana's Right-to-Work Law*, The Buckeye Institute 4 (Sept. 4, 2015).[3] While Indiana's union membership decreased immediately following enactment of the law, it has since recovered. In 2014, Indiana's union membership was as close to the national average as it has been since 2008. *Id.*[4]; *see also* Network Indiana, *Right to Work Not Decreasing Union Membership*, Indiana Public Media (July 25, 2014).[5] In fact, in the first full year under the law, Indiana actually added 3,000 union members. "[N]othing in the data collected so far suggests that Indiana's right-to-work law has harmed unions' ability to recruit or maintain members." Lampman, at 5. Following the initial bump in members, union membership in

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[3] https://www.buckeyeinstitute.org/library/doclib/Surprising-Results-from-Indiana-s-Right-to-Work-Law.pdf.

[4] While some scholars have raised questions about public-sector union data in the United States Census Bureau and the Bureau of Labor Statistics Current Population Survey (CPS), *see, e.g.*, Patrick J. Wright, *Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey's Public Sector Unionism Data Sufficiently Reliable?* U. Chi. Legal F. (forthcoming Nov. 2017), this brief relies on data derived from CPS for two reasons. The CPS data remains "the primary source of labor force statistics for the population of the United States," and it is widely acknowledged to be the gold standard for such data. United States Census Bureau, Current Population Survey, https://www.census.gov/programs-surveys/cps.html (last visited Nov. 28, 2017).

[5] http://indianapublicmedia.org/news/work-decreasing-union-membership-69882/.

Indiana for 2015 and 2016 continued to increase, reaching levels higher than those seen in even 2008.[6]

Despite being far more unionized than Indiana, Michigan followed suit and in 2013, enacted a right-to-work law. While its net membership initially declined from 633,000 in 2013 to 606,000 in 2016, the 2016 figure exceeds the membership total for 2014, showing an upward trend.[7] The results from Oklahoma show a similar effect. While Oklahoma has historically been less unionized than the nation overall, since enacting its right-to-work law in 2001, it "has been losing union members at a slower rate than the national average." Lampman, at 6.

The results from Indiana and Michigan are consistent with nationwide trends which show that between 2004 and 2013, overall union membership increased by 0.5% in right-to-work states. By contrast, in states with government-coerced union fees, union membership actually decreased by 4.6% over the same time period. *See* Jason Russell, *How Right to Work Helps Unions and Economic Growth*, Economics21 (Aug. 27, 2014).[8] And, while Oklahoma's experience

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[6] *See* United States Department of Labor, Bureau of Labor Statistics, Union Membership Historical Table for Indiana, https://www.bls.gov/regions/midwest/data/unionmembershiphistorical_indiana_table.htm (last visited Nov. 28, 2017).

[7] *See* United States Department of Labor, Bureau of Labor Statistics, Union Membership Historical Table for Michigan, https://www.bls.gov/regions/midwest/data/unionmembershiphistorical_michigan_table.htm (last visited Nov. 28, 2017).

[8] It is worth noting that in states with government-coerced union fees, union membership actually *decreased* by 4.6% over the

does not show an increase in union membership, it does not support the notion that right-to-work laws threaten the extinction of unions. Moreover, ten of the eighteen states that experienced an increase in union membership between 2013 and 2014 were right-to-work states. *See* News Release, Bureau of Labor Statistics, *Union Members 2014*, USDL-15-0072 (Jan. 23, 2015), Table 5.[9]

Plainly, changes in the rate of union membership predate this Court's decisions in *Knox* and *Harris*. The experience of states that recently enacted right-to-work laws suggests that the effect of these laws does not impair the ability of unions to operate or to attract members at rates consistent with or better than unions in union security states.

B. The number of opt-outs likely to result from overruling *Abood* is smaller than the number of covered nonunion members.

Despite the sounding of alarm bells, overruling *Abood* will not result in a significant increase of any "free riders." Put simply, if Petitioner and others similarly inclined were required to join the union (instead of not joining and still being forced to pay the agency fee), some would join, but more would look for other

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same time period. http://www.economics21.org/commentary/how-right-work-helps-unions-and-economic-growth (Sept. 1, 2015 1:35 PM) [http://perma.cc/4KQM-6WEL].

[9] https://www.bls.gov/news.release/archives/union2_01232015.pdf.

nonunion work. That conclusion flows from research regarding the nature and extent of free ridership.

As one scholar has concluded, right-to-work laws can simultaneously lead to free riding and have a small effect on union membership. Russell S. Sobel, *Empirical Evidence on the Union Free-Rider Problem: Do Right-to-Work Laws Matter?*, 16 J. Lab. Res. 347 (Summer 1995).[10] Based on his research, Sobel estimates that "no more than 30 percent of the covered nonmembers" would become union members if joining a union was a condition of their employment, and that "approximately 70 percent of the covered nonmembers in [right-to-work] states would switch to nonunion jobs if [right-to-work] laws were repealed." *Id.* at 361.

Sobel divides covered nonunion members into true free riders and induced free riders. He defines true free riders as those who "are currently not paying the costs of membership because they know they will receive the benefits of coverage anyway." *Id.* at 348. In contrast, induced free riders would "opt out of union membership by finding a nonunion job because they value" the benefits of coverage less than their jobs. *Id.* They "are only induced to take the union-covered job because they do not have to pay the cost of membership." *Id.*

Sobel notes that it is important to distinguish between true and induced free riders because "if [right-to-work] laws were to be repealed and union shops were formed, only the true free riders would become

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[10] http://sobelrs.people.cofc.edu/All Pubs PDF/Do Right-to-Work Laws Matter.pdf.

and remain union members." *Id.* Conversely, the induced free riders would look for a nonunion job. "[T]he greater proportion of the total covered nonmembers that are induced riders, the less union membership is affected by [right-to-work] laws." *Id.*

Sobel's analysis of survey data yields estimates of the number of true and induced free riders. For true free riders, the average of his estimates from 5 models is 14.83% for non-right-to-work states, and 14.29% for right-to-work states, with an overall average of 14.62%. *Id.* at 358-59. He observes that "while there is a larger percent of covered workers who are not union members in [right-to-work] states, there is not a large difference in the proportion of the covered nonmembers who are true free riders." *Id.* at 359.

One can view the limit on the likely number of new disaffiliations that may occur if unions can no longer force agency fees on nonmembers in one of two ways. First, nationally, about 17% of the workers covered by a union contract are non-members in non-right-to-work states; they are about 7% of the total in right-to-work states. James Sherk, *Right-to-Work Laws Don't Lower Private-Sector Pay*, Heritage Foundation Issue Brief No. 4457, at 1 (Sept. 1, 2015); *see also* Sobel, 16 J. Lab. Res. at 349, 361. The 17% and 7% figures should be seen to include both true free riders and induced free riders. Sobel found that "approximately 70 percent" of the covered nonmembers in right-to-work states are induced free riders, who would look for a nonunion job if the right-to-work law was repealed. Sobel, 16 J. Lab. Res. at 361. That 70% of the 7% would

represent the likely limit of the effect of a ruling in favor of Petitioner. Accordingly, the number of likely opt-outs is limited, which helps to explain why the enactment of right-to-work laws in Indiana, Michigan, and Oklahoma did not lead to catastrophic losses in union membership.

C. Enactment of Indiana's right-to-work law did not reduce union spending.

When employees can choose whether to support a union financially, union dues reflect the market value of services provided and are thus viewed as being more reasonable. Union dues are on average 10% lower in right-to-work states than in states where non-members can be compelled to pay agency fees. *See* James Sherk, *Unions Charge Higher Dues and Pay Their Officers Higher Salaries in Non-Right-To-Work States*, Heritage Foundation Backgrounder No. 2987, at 6-7 (Jan. 26, 2015). Following basic economics, "unions act like corporations when using their monopoly power" in that both "tend to raise prices when their customers have no other options." *Id.* at 7.

That said, enactment of right-to-work laws does not starve the unions of funds. Rather, the facts show that a loss of some agency fees does not have a substantial – and in some cases – any effect on union activities. Take Indiana for example. Following enactment of its right-to-work law, gross spending for the state's larger unions actually increased, and its allocation was largely unchanged. Predictably, Indiana's unions increased their political spending during the

legislative debate over the right-to-work law. What is telling is that political spending rose significantly "and is now well above the spending averages seen before the law was passed." Lampman, at 1-2.

While union spending in Indiana increased, "the state's right-to-work law has had virtually no meaningful effect on how Indiana unions spend their money and allocate their resources." *Id.* at 2. Spending on representational activities increased slightly in 2013 and 2014, and the percentage of spending on overhead and administration went down slightly. *Id.* Spending on other activities is comparable to 2010 and 2011 levels. *Id.* at 3.

The slight change in the allocation of union spending benefits union members. "Higher representational spending and lower overhead costs signal that unions may be becoming more competitive and more concerned about their membership." *Id.* at 3. One can conclude that "[w]ithout the forced agency fees from nonmembers, unions must become more efficient and prove themselves more attractive to workers in order to boost and maintain their membership." *Id.*

III. At worst, union leadership can respond to an overturning of *Abood* by refocusing its attention on actions that are likely to increase worker satisfaction with the union and their jobs.

As previously discussed, overruling *Abood* will not likely result in any significant decline in union

membership or union spending. It will, however, remove union leaders' ability to coerce nonmembers to pay agency fees and support a union they do not wish to join. But that is not a bad thing. Rather, it provides union leadership an opportunity to work harder for their members and to increase the value of union membership. It also provides them with an opportunity to help fix a problem that has plagued mandatory unions for decades: the lack of correlation between union membership and job satisfaction. Refocusing their attention to increasing union member job satisfaction will likely result in increased satisfaction with the union itself and increase union membership. While these reasons in and of themselves do not address the legal infirmities of *Abood*, they can put at ease policy concerns and show that unions need *Abood* to survive.

A. Union membership does not correlate with job satisfaction.

"One of the most consistent findings in the industrial relations literature is that job satisfaction is lower among unionized workers than nonunionized workers." Michael E. Gordon & Angelo S. Denisi, *A Reexamination of the Relationship Between Union Membership and Job Satisfaction*, 48 Indus. & Lab. Rel. Rev. 222, 222 (1995); *see also* Ronald Meng, *The Relationship Between Unions and Job Satisfaction*, 22 Applied Econ. 1635, 1635 (1990) ("The empirical results tend to be uniform. Union members report significantly less job satisfaction than their non-union counterparts."). As two other scholars put it: "[I]n general there is

evidence that while unions may have a strong positive effect on money wages, they have a strong and negative effect on job satisfaction."[11] Jane H. Lillydahl & Larry D. Singell, *Job Satisfaction, Salaries and Unions: The Determination of University Faculty Compensation*, 12 Econ. Educ. Rev. 233, 233 (1993).

"One of the more robust findings in the literature is that union workers express more job dissatisfaction than non-union workers." Lillydahl & Singell, at 234. A look into unionized and non-unionized universities revealed that this is true even when the union members know that they make more money than their non-union counterparts. *Id.* at 235. This is because, as the studies show, "union membership is associated with dissatisfaction with aspects of one's job other than salary." *Id.* at 238. Further, higher salaries do not remedy the "lower levels of satisfaction with the quality of the university environment, the support services for teaching and research, and the authority they have over their work assignments." *Id.* at 242.

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[11] Ronald Meng reached similar conclusions with respect to the attitudes of Canadian union members toward their unions. He found that unionized workers are more satisfied with their compensation and job security than they are with other aspects of their jobs, like how interesting they find their jobs, whether they are free to decide what work they will do, and whether they have influence over their superior's decision making. *Id.* at 1639-42, 1646.

B. Unions have demonstrated that they can thrive without compulsory dues by focusing attention to their members and their priorities.

The Washington Post reported that "it took mortal danger for some unions to realize they've taken their membership for granted." *See* Lydia DePillis, *The Supreme Court's Threat to Gut Unions is Giving the Labor Movement New Life*, The Washington Post (July 1, 2015).[12] One union activist explained: "A lot of people have lost faith in the union [AFSCME], because they haven't seen anyone." *Id.* AFSCME President Lee Saunders candidly acknowledged: "We stopped communicating with people, because we didn't feel like we needed to." *Id.* The fear of losing the ability to force nonmembers to pay agency fees has caused union leaders to "reach [out to] workers who may have been paying agency fees for years and never had any contact with a union representative." *Id*; *see also* Noam Scheiber, *A Power Broker Who Wants Labor at the Table, Not on the Menu*, The New York Times (July 29, 2016)[13] ("Mr. Saunders has begun to address one huge vulnerability for public sector unions – the weakness of members' personal ties to one another and their leaders.").

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[12] http://www.washingtonpost.com/news/wonkblog/wp/2015/07/01/the-supreme-courts-threat-to-gut-unions-is-giving-the-labor-movement-new-life.

[13] http://www.nytimes.com/2016/07/30/business/a-union-power-broker-in-an-age-of-insurgencies.html?_r=0&mtrref=undefined.

In the same way, after this Court's decision in *Harris v. Quinn*, Secretary-Treasurer Gary Casteel of the United Auto Workers recognized the need for management to pay attention to members. He saw that right-to-work laws were not the end of unions, but a spur to activity. Casteel explained, "[I]f I go to an organizing drive, I can tell these workers, 'If you don't like this arrangement, you don't have to belong.' Versus, 'If we get 50 percent of you, then all of you have to belong, whether you like to or not.' I don't even like the way that sounds, because it's a voluntary system, and if you don't think the system's earning its keep, then you don't have to pay." *See* Lydia DePillis, *Why* Harris v. Quinn *isn't as bad for workers as it sounds*, The Washington Post (July 1, 2014).[14]

It is no surprise that in states that require non-union members to pay agency fees, the union officials' lack responsiveness. The failure to respond or even consider the concerns of both members and non-members follows from the fact that "unions do not have to cultivate workers' support to remain their representatives." James Sherk, *One Person, One Vote, One Time? Re-election Votes Hold Unions Accountable to Their Members*, The Buckeye Institute (Sept. 5, 2016), at 1. Such "[i]nherited representation . . . makes [unions] less responsive to their members' concerns." *Id.* at 4.

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[14] https://www.washingtonpost.com/news/wonk/wp/2014/07/01/why-harris-v-quinn-isnt-as-bad-for-workers-as-it-sounds/?utm_term=.50fdf8d00c75.

In *One Person, One Vote*, Sherk observes, "Only 7 percent of private sector union members voted for their union." *Id.* at 2. That follows from the fact that, in many instances, the union was recognized as the exclusive bargaining agent long before the employees came to work. Take General Motors, where the UAW was recognized as the bargaining agent in 1937. Present GM workers "inherit" their unions, they do not choose them. *Id.*[15] This "union immunity" from market forces results in union members being dissatisfied with their union representatives. For example, more private sector and government union members disapprove of America's union leadership than approve of it. *Id.* In numbers that really should not shock anyone, 66% believe that union officers primarily look out for themselves, and 63% consider union leaders to be overpaid, while 57% think union dues are too high for the value they return. *Id.*

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[15] High-performing unions are likely to retain their membership when people are given a choice as an Iowa law, effective in February 2017, shows. That law requires a recertification election each time the union faces a new contract negotiation. The large majority of bargaining units subject to the law have voted to recertify, but 32 units chose not to. *See* The Des Moines Register, *Database: Iowa Public-Sector Union Recertifications*, http://db.desmoinesregister.com/iowa-public-sector-union-recertifications/page=1 (last visited Nov. 28, 2017). Most significantly, in the largest vote so far, in October, public sector union employees voted overwhelmingly in favor of recertification. *See* Brianne Pfannenstiel, *In Biggest Vote Since New Law, Iowa Public Unions Overwhelmingly Choose to Recertify*, The Des Moines Register (Oct. 25, 2017).

Instead of relying on state coercion to generate agency fees, union leadership concerned about the size of membership rolls could choose to follow the lead of the AFSCME and UAW officials in the stories above. Union leaders could reach out to members and covered nonmembers and sell them on the benefits of union membership. They could focus their attention on the priorities of their members, including their administrative overhead costs. More specifically, "[i]tems such as wages, fringe benefits, health insurance, and job security consistently rank at the top of the members' lists of priorities. Job content and quality of work life issues come lower down. Political goals are quite low."[16] Daniel G. Gallagher & George Strauss, *Union Membership Attitudes and Participation*, 1, 4 (Inst. Res. Lab. Emp., Working Paper #29-91 (1991)); *see also* Meng at 1639 n.8 ("By politicizing their members, unions lead workers to report less job satisfaction.").

Rather than spending money on the issues that truly concern their members (and potentially nonmembers forced to pay agency fees), unions spend big money on politics and lobbying. Between 2005 and 2011, unions spent $4.4 billion on political advocacy. *See* Tom McGinty and Brody Mullins, *Political*

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[16] Gallagher and Strauss also explain, "Membership satisfaction is based, in part, on how well the union meets expectations with regards to traditional collective bargaining 'bread-and-butter' issues. However, to a surprising extent satisfaction is also strongly related to internal union process, for example, whether officers listen to the members, handle grievances fairly, provide feedback, and permit members to have a say in the union's governance." Gallagher & Strauss, at 20.

Spending by Unions Far Exceeds Direct Donations, Wall Street Journal (July 10, 2012).[17] The National Education Association spent $40 million in the 2014 mid-term election cycle alone, and the American Federation of Teachers spent $20 million. *See* Lauren Camera, *Teachers' Unions to Spend Far More Than Ever in State, Local Elections*, Education Week (Oct. 22, 2014).[18] Certainly, unions have the constitutional right to spend as much on political causes and to direct that funding as they want. Even so, "[f]ully 60 percent of union members oppose such [political] spending on their behalf." *See* Sherk, *One Person, One Vote* at 5.

Finally, unions in right-to-work states are more conservative in their spending on overhead costs, which contribute little to employee satisfaction. One econometric study found that union officials paid themselves an average of $20,000 more in union security states than in right-to-work states (even after controlling for broader economic conditions in each state). *See* Sherk, *Unions Charge Higher Dues* at 11.

In short, unions are capable of standing on their own. They don't need *Abood's* help.

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[17] https://www.wsj.com/articles/SB10001424052702304782404577488584031850026.

[18] https://www.edweek.org/ew/articles/2014/10/21/10campaignfinance.h34.html.

CONCLUSION

For the foregoing reasons and those advanced by Petitioner, this Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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